BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JEROLD L. LAMB (DECEASED) Claimant	)	
V.	)	
SOUTHWEST COMMODITIES, LLC Respondent	)	
AND	)	Docket No. 1,068,551
RIVERPORT INSURANCE COMPANY Insurance Carrier	)	
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Insurance carrier (Riverport) requested review of the June 17, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on October 23, 2015. Coy M. Martin of Wichita, Kansas, appeared for respondent. Douglas M. Greenwald of Kansas City, Kansas, appeared for Riverport. Terry J. Malone of Dodge City, Kansas, appeared for Kansas Workers Compensation Fund (Fund).

The ALJ found respondent had workers compensation coverage by Riverport on January 16, 2014, the date of claimant's accidental injury which resulted in his death.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Riverport argues it has no duty to defend respondent in these proceedings and has no duty to indemnify respondent for the benefits awarded to claimant's widow for the work-related accident occurring January 16, 2014. Riverport contends the policy effective

October 22, 2013, was effectively canceled December 25, 2013, and the award of compensation benefits should be against respondent and/or the Fund exclusively.

Respondent argues its policy with Riverport was in effect at the time of claimant's accident. Respondent contends Riverport had no lawful grounds to attempt cancellation of its policy under either K.S.A. 40-2,120 or the terms of the policy. Further, respondent argues the cancellation notice, which it was never provided, violated the specificity requirements of K.S.A. 40-2,122 and the terms of the policy. Respondent maintains the ALJ's Award should be affirmed.

The Fund adopts the arguments and analysis set forth by respondent.

Claimant's counsel did not appear or submit a brief to the Board.

The issue for the Board's review is: was Riverport's workers compensation policy properly and effectively canceled prior to January 16, 2014, relieving Riverport of the duty to indemnify respondent for the award of benefits to claimant's widow?

FINDINGS OF FACT

Respondent is a trucking company located in Garden City, Kansas. On January 16, 2014, claimant suffered an accidental injury arising out of and in the course of his employment with respondent which resulted in his death.

Eric Kramer is the sole member of respondent and Kramer Harvesting, LLC, an agricultural hauling business. While respondent and Kramer Harvesting share a mailing address, office, phone number and bookkeeper they are two separate and distinct limited liability corporations. Riverport issued an assigned risk workers compensation insurance policy to Kramer Harvesting effective June 11, 2013, through June 11, 2014. Respondent is on the policy as an additional insured.

On August 28, 2013, a Notice of Cancellation of Workers' Compensation Policy was sent by certified mail to Kramer Harvesting, stating the policy would be canceled effective October 2, 2012, for failure to obtain preliminary audit information. The notice was returned to Riverport unclaimed. Patrick Cushing, policy services supervisor for Riverport's third party administrator Berkley Assigned Risk Services (Berkley), noticed the returned mail and directly contacted Mr. Kramer. Mr. Kramer agreed to comply with the audit request, and Mr. Cushing agreed to reinstate the policy. A preliminary audit was assigned to Amy Deines, an auditor for Infinity Insurance Solutions (Infinity), on September 24, 2013.

Ms. Deines testified Riverport requires a preliminary audit when insuring a new policy to project the estimated premium cost for the following year. Ms. Deines performs field audits, where she gathers payroll information to submit to Berkley. Ms. Deines performed the preliminary audit for respondent on October 21, 2013.

On October 1, 2013, a cancellation notice was sent by certified mail to Kramer Harvesting, stating the policy would be canceled effective October 16, 2013, for reasons of nonpayment of premium. The notice was returned unclaimed on October 28, 2013. Robert Brown, respondent's manager, provided the premium payment after October 16, 2013. A Notice of Reinstatement was issued effective October 22, 2013, through June 11, 2014. As a result of the lapse in coverage from nonpayment, a new number was assigned to the policy effective October 22, 2013, through June 11, 2014.

When an insurance policy is canceled, both Riverport and the National Council on Compensation Insurance (NCCI) require a final audit to determine the actual cost for the policy term. Berkley assigned the final audit to Ms. Deines on October 24, 2013, three days after the preliminary audit was completed. Ms. Deines testified she attempted to contact Mr. Brown on multiple occasions before submitting she was unable to complete the final audit.

A Notice of Cancellation was sent by certified mail to Kramer Harvesting on November 20, 2013, stating the policy would be canceled effective December 25, 2013, for noncompliance with the final audit. Specifically, it said, "Reason for cancellation: Unable to Obtain Audit Information. We have been unable to obtain the physical audit information on the prior year's policy WC-15-81-028657-00."[1] The notice was returned to Berkley unclaimed on December 16, 2013. Chris Gall, insurance agent for respondent, also received a copy of the cancellation notice but did not forward it to respondent because he did not know it was in the file until January 2014. He did not know how he missed the cancellation notice.[2]

An audit closeout notice was sent to Kramer Harvesting that same day, indicating the final premium could not be determined because the final audit had not occurred. It said, "Failure to afford access to your operations for auditing purposes may result in the cancellation of your policy . . . ."[3] Mr. Brown testified he ignored the audit closeout notice because he had recently given Ms. Deines audit information, and it could sometimes take three to four weeks for the information to return to Berkley.

Claimant's work-related accident occurred January 16, 2014. Mr. Brown submitted an accident report on behalf of respondent January 28, 2014. Berkley replied on January 31, 2014, stating the policy was canceled effective December 25, 2013; therefore, the accident date falls outside the period of coverage and "[i]t is further our position that this

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[1] Cushing Depo., Ex. L at 3.

[2] See Gall Depo. at 60-62.

[3] *Id*. at 1.

policy does not create a duty for us to defend this claim on your behalf."[4] Mr. Brown testified he was unaware the policy had been canceled until his receipt of this letter. Additionally, the letter incorrectly lists claimant's employer as Kramer Harvesting. The accident report lists claimant's employer as respondent.

Mr. Brown assumed respondent continued to have coverage because Certificates of Liability Insurance, printed as early as January 13, 2014, indicated both respondent and Kramer Harvesting had workers compensation coverage for the period of October 23, 2013, through June 11, 2014.[5] Respondent provides these certificates to its customers as proof of coverage. Mr. Gall stated his office obtains the certificates from Berkley's website. Both Mr. Gall and Mr. Brown testified they relied upon the certificates as a reliable source of coverage information.

A final audit of the policy effective October 22, 2013, through December 25, 2014, was performed in May 2014. Riverport returned nearly $3,000 in overpayments to respondent and Kramer Harvesting on May 7, 2014.

Riverport currently provides workers compensation insurance coverage to respondent with a policy effective February 1, 2014.

PRINCIPLES OF LAW

K.S.A. 40-2,120 states:

> No policy of property or casualty insurance, other than accident and sickness, used primarily for business or professional needs that has been in effect for 90 days or more may be canceled except for one of the following reasons:
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> (a) Nonpayment of premium;
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> (b) the policy was issued because of a material misrepresentation;
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> (c) any insured violated any of the material terms and conditions of the policy;
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> (d) unfavorable underwriting factors, specific to the insured, exist that were not present at the inception of the policy;
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> (e) a determination by the commissioner that continuation of coverage could place the insurer in a hazardous financial condition or in violation of the laws of this state; or

[4] Brown Depo., Ex. 9 at 1.

[5] See Gall Depo., Ex. 17.

(f) a determination by the commissioner that the insurer no longer has adequate reinsurance to meet the insurer's needs.

K.S.A. 40-2,122 states:

Any insurance company doing business in this state **shall provide to an insured a written explanation specifically detailing the reasons why such company canceled or denied renewal of an existing policy of insurance.** There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer, its authorized representative, its agents, its employees, or any firm, person or corporation furnishing to the insurer information as to reasons for cancellation or denial of renewal of an existing policy of insurance, for any statement made by any of them in any written notice of cancellation or denial of renewal of an existing policy of insurance, for the providing of information pertaining thereto, or for statements made or evidence submitted at any hearings conducted in connection therewith, if such information was provided in good faith and without malice. [Emphasis added.]

ANALYSIS

The parties allowed the ALJ to decide the sole issue in this case, which is essentially a contract issue, and agreed at oral argument that the Board has jurisdiction. In *Kingsley v. Kansas Dep't of Revenue*,[6] the Kansas Supreme Court wrote:

> Subject matter jurisdiction is vested by statute and establishes the court's authority to hear and decide a particular type of action. *Pieren-Abbott v. Kansas Dept. of Revenue,* 279 Kan. 83, 92, 106 P.3d 492 (2005). Parties cannot confer subject matter jurisdiction by consent, waiver, or estoppel, and parties cannot convey subject matter jurisdiction on a court by failing to object to the court's lack of jurisdiction. *Kansas Bd. of Regents v. Skinner,* 267 Kan. 808, Syl. ¶ 5, 987 P.2d 1096 (1999). If the district court lacks jurisdiction to make a ruling, an appellate court does not acquire jurisdiction over the subject matter on appeal. *State v. McCoin,* 278 Kan. 465, 468, 101 P.3d 1204 (2004).

The Board has held in the past an appeal made to determine whether a non renewal notice was ineffective is not an issue over which the Board has jurisdiction.[7] The Court of Appeals has found that, in a proceeding which does not address the injured worker's right to compensation, the general rule is workers compensation coverage disputes are to be

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[6] *Kingsley v. Kansas Dep't of Revenue*, 288 Kan. 390, 395, 204 P.3d 562, 568 (2009).

[7] *Corrigan v. Degginger's Foundry*, No. 210,434, 1999 WL 195251 (Kan. WCAB Mar. 26, 1999); citing *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan.App.2d 492, 794 P.2d 662 (1990).

litigated in a separate proceeding, *i.e.*, in district court.[8] The dispute between respondent and Riverport does not affect the right of claimant's widow to an award of compensation.

In *American States Ins. Co. v. Hanover Ins. Co.,* the Court wrote:

> Unless specifically allowed by statute, insurance companies may not litigate in the workers compensation division their respective liability for an award if the employee's interests are not at issue.[9]

In an unpublished opinion, the Court of Appeals cited *American States*, writing:

> Here, the Board specifically found the "Division of Workers Compensation does not have the authority or jurisdiction to determine the respective liability of two or more insurance carriers."• In so finding, the Board was relying on *American States Ins. Co. v. Hanover Ins.* Co., 14 Kan.App.2d 492, 498, 794 P.2d 662 (1990): "Unless specifically allowed by statute, insurance companies may not litigate in the workers compensation division their respective liability for an award if an employee's interests are not at issue."[10]•

Other appellate court cases that address whether a carrier's liability can be litigated in a workers compensation proceeding hold:

- The [Workers] Compensation Act has as its primary purpose an expeditious award of compensation in favor of an injured employee against all persons who may be liable therefor. The Act does not contemplate that such proceedings should be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the Act for the payment of compensation. Questions of contractual obligations or even equitable considerations may well be involved between the responsible parties which are of no concern to the injured employee. If such questions are involved, they should be resolved by a court in an

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[8] See *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 174, 239 P.3d 51 (2010); *Kuhn v. Grant County*, 201 Kan. 163, 171-72, 439 P.2d 155 (1968); *Landes v. Smith*, 189 Kan. 229, 236, 368 P.2d 302 (1962); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 831-33, 366 P.2d 270 (1961); *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 97, 150 P.3d 316 (2007); *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App. 2d 492, 496-99, 794 P.2d 662 (1990). We discern no difference to treat a dispute between insurance carriers any differently than a dispute between an insurance carrier (Riverport) and an employer (Southwest).

[9] 14 Kan. App. 2d at 498.

[10] *Bernd v. Vallis Form Serv.*, No. 98,178, 2008 WL 3367597, 189 P.3d 580 (Kansas Court of Appeals unpublished opinion filed Aug. 8, 2008).

> independent proceeding in which the employee should not be required to participate.[11]
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> - The claimants in this, or any other, [workers] compensation appeal should not be required to stand by while the employer and the insurance carrier settle their personal disputes with respect to such matters.[12]
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> - The present action presents a graphic illustration of the hardship which may confront a claimant where insurance carriers are permitted to litigate, during the compensation process, claims and equities existing between themselves. . . . These are adversities which a claimant should not be forced to undergo. While we recognize the right of insurance carriers to be protected in their legal rights and to engage in litigation when disputes over their respective liabilities arise between them, yet their quarrels should not be resolved at the expense of an injured workman.[13]
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> - [W]e agree generally with the notion expressed by the ALJ and in the case law that insurance carriers should not litigate disputes about their respective liabilities for the compensation awarded to an injured worker in the compensation proceedings. Instead, these matters should be decided in separate proceedings between the carriers brought for such purposes and outside the Board's jurisdiction.[14]

The Court of Appeals and the Board have issued opinions contrary to *American States.* In *Johnson v. United Excel Corp.*,[15] the Court of Appeals indicated the Board erred in not construing an insurance policy to find an employer did not secure the payment of compensation, as contained in K.S.A. 44-503(g) and K.S.A. 44-532b. In *Johnson*, the policy was limited to coverage in Nebraska and limited extra-territorial coverage that did not cover Johnson's accidental injury in Kansas. *Johnson,* however, does not address whether an employer and an insurance carrier should seek a remedy in a separate district court proceeding, and the case does not mention the precedent listed in footnotes 8-14.

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[11] *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 831, 366 P.2d 270 (1961).

[12] *Landes v. Smith*, 189 Kan. 229, 236, 368 P.2d 302 (1962).

[13] *Kuhn v. Grant County*, 201 Kan. 163, 171-72, 439 P.2d 155 (1968).

[14] *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 174, 239 P.3d 51 (2010).

[15] *Johnson v. United Excel Corp.*, No. 99,428, 200 P.3d 38 (Kansas Court of Appeals unpublished opinion filed Jan. 30, 2009) *rev. denied* 289 Kan. 1279 (2009)

In *Carpenter v. National Filter Service*,[16] the Board addressed a coverage dispute on appeal from an award following a full hearing. However, such case involved disputes regarding the amount of the employee's functional impairment and computation of the employee's average weekly wage. In this case, the sole issue before the Board involves the insurance contract.

The Board finds it and the ALJ lack subject matter jurisdiction to decide a dispute involving the specifics of an insurance contract. A judgment rendered without subject matter jurisdiction is simply void.[17]

CONCLUSION

The ALJ and Board do not have subject matter jurisdiction to decide the contract issue presented in this claim. The ALJ's order of benefits against respondent and insurance carrier is left undisturbed by our conclusion. If respondent and insurance carrier wish to litigate coverage, they may do so in district court.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the appeal of Administrative Law Judge Pamela J. Fuller's Award, dated June 17, 2015, is dismissed. The ALJ's award against the respondent and insurance carrier is left in place.

IT IS SO ORDERED.

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[16] *Carpenter v. National Filter Service*, No. 227,852, 2003 WL 359851 (Kan. WCAB Jan. 30, 2003).

[17] *Miller v. Glacier Dev. Co.*, 293 Kan. 665, 672, 270 P.3d 1065, 1070 (2011).

Dated this _____ day of January, 2016.

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BOARD MEMBER

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Hon. Pamela J. Fuller, Administrative Law Judge